

No. 12662

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH DENUNZIO FRUIT COMPANY, a corporation,
Appellant and Cross-Appellee,
vs.

RAYMOND M. CRANE, doing business as Associated Fruit
Distributors of California,
Appellee and Cross-Appellant,

JOHN C. KAZANJIAN, doing business as Red Lion Pack-
ing Company,
Appellee.

CROSS-APPELLANT CRANE'S REPLY BRIEF.

HENRY O. WACKERBARTH,
601 Fay Building, Los Angeles 13, California,
Attorney for Cross-Appellant Raymond M. Crane,
doing business as Associated Fruit Distribu-
tors of California.

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CROSS-APPELLANT CRANE'S REPLY BRIEF.

In the brief of cross-appellee Denunzio he contends (1) the evidence shows Crane was agent of seller and (2) that a broker is the agent of the party first employing him. These contentions are predicated upon an unreasonable interpretation of the evidence.

Crane Was Not Agent of Seller.

Denunzio contends that the use of the word "book" in the September 26th telegram shows an intention "to make an engagement" to sell the grapes and he relies upon the *Bartles v. Fox* case for support.

The *Bartles-Fox* case was one where the buyer ordered seed and the seller replied "we have booked your order

for * * * seed." The Court held that the seller's letter was an acceptance of the order and the order and acceptance constituted a binding contract. The facts in the case at bar are entirely different from those presented in the *Bartles-Fox* case.

Certainly the question as to whether or not Crane was agent for the buyer or seller cannot be determined from the use of the word "book" without considering the other portions of said telegram and the other telegrams passing between Crane and Rains and the teletype conversations occurring between the passing of the telegrams. We should, therefore, look to all the evidence to determine whether Crane was making an offer to sell as the principal or as agent for someone else as principal. Crane was aware that, at that time, there was a seller's market and those having grapes had no difficulty in selling same, that the only problem presented was selecting to whom they would sell. Crane was also aware that under these circumstances no grower or packer of grapes would employ a broker to sell same and pay him a commission.

Crane being in the brokerage business proceeded to transfer grapes from the packing house to the ultimate consumer in a way that he could procure a commission for his services [Tr. pp. 221-2]. The way adopted by Crane, as we view the evidence, was to offer to perform services for a buyer in procuring grapes, providing the buyer would pay him a procuring brokerage or procuring charge for his services.

In the case at bar the documentary evidence discloses (1) a buyer—Denunzio, (2) a seller—Kazanjian, (3) a procuring broker—Crane, and (4) an intermediate broker—Rains. At no time did Crane represent himself as seller or agent for seller. Crane's September 26th tele-

gram clearly discloses two different parties—a seller and a procuring broker. The relevant parts of the telegrams are as follows: “Can book Emperors * * * we to personally inspect AFOHD (F.O.B. Acceptance Final) Basis our Inspection Shipper to Trans Title on or after December 10th He paying all storage charges * * * Price 2.53 net to shipper which ceiling that time We charging 50.00 Procurement charge * * *” [Tr. p. 202].

In the September 28th teletype conversation between Rains and Crane, Rains proposed a deal different than the September 26th telegram and Crane replied “We will have to put that up to the shipper * * *” [Tr. p. 227].

On October 2nd Crane wired Rains that he had secured a revised deal on the Emperors at 2.50 net [Tr. p. 205]. In a teletype conversation on October 2nd Rains approved a sale of 3 cars to another merchant he represented [Tr. p. 230] and on the same day Crane telegraphed Rains: “Talked Shipper Red Lyon Packing Company Confirms Krotzki * * * Emperors available now only two more cars possibly three same base” [Tr. p. 206]. (Krotzki was the other merchant represented by Rains.)

There can be no misunderstanding from these telegrams and teletypes as to Crane’s position. The constant reference to the seller as “shipper” and reference to “we” as the procuring broker in the telegrams and teletypes, coupled with the oral evidence as to the custom of the trade to the effect that a buying or procuring broker is the agent of the buyer [Tr. pp. 215-6], shows Kazanjian (Red Lion Packing Co.) to be the seller and Crane to be the agent of the buyer.

The fact that in the September 26th telegram Crane was to inspect the grapes and buyer was to accept same

on the strength of Crane's inspection would show Crane was buyer's agent. Certainly a buyer would not ask the seller or the seller's agent to inspect the grapes for the buyer and agree to be bound by the seller's inspection or inspection by seller's agent.

Denunzio further states that the maximum price ceiling was 2.53 when seller was acting through a broker or car lot distributor and that Crane considered himself agent of the seller, otherwise he would not have set forth the ceiling price in his quotation.

In answer to this we state: first, the ceiling price was 2.50 not 2.53 (see Appellee Crane's Brief, pp. 3 to 7, incl.); and secondly, that the telegram of October 2nd [Tr. p. 205] correctly sets forth the ceiling at 2.50; and thirdly, that if Denunzio agreed to pay ceiling price to the seller and to pay the seller's agent a commission in addition thereto he was, and should have known he was, violating the price ceiling (see Argument, Appellee Crane's Brief) and that such a contract was void.

As we view these facts, Crane was trying to earn a commission. He knew that the seller was demanding the full ceiling price and that he (Crane) had to get his commission from the buyer, and therefore he offered to procure (book) grapes for the buyer, providing buyer would pay him a commission called "procurement charge." He was, therefore, the agent of the buyer.

The use of the code word "ADLAM" meaning "offered subject to confirmation" would refer to a confirmation by the seller. Rains clearly recognized the seller was to confirm, for in his teletype conversation of October 2nd [Tr. p. 230] he calls for a confirmation, and in Crane's

telegram in reply thereto he states: "Red Lyon * * * confirms."

Crane, as agent of buyer, was ordering the grapes and the seller confirmed. There was no request for a confirmation by buyer or by Crane.

Crane Was Not First Employed by Kazanjian.

Denunzio advances the argument that Kazanjian first employed Crane, therefore Crane was Kazanjian's agent, even though Denunzio was to pay for Crane's services. Denunzio thereupon seeks to prove Kazanjian first employed Crane by quoting from the Findings of the Secretary of Agriculture and Judge O'Connor (Brief of Appellee Joseph Denunzio Fruit Co., p. 9). The quoted Findings do not constitute a finding of employment of Crane by Kazanjian first, or at any time.

The evidence showed that Kazanjian did not and would not employ Crane or any other broker to sell grapes during the 1944 season [see Crane's evidence, Tr. pp. 198 to 200 incl.] and that where a broker sends out form telegrams to numerous other brokers calling for the payment to the sending broker of a "procurement charge" the understanding was that the brokers receiving the telegrams would notify their buyers that such buyers could procure grapes through the sender of the telegrams providing the buyer was willing to pay the broker sending the telegrams a procuring or buying charge [Tr. p. 215].

This evidence does not disclose the "first employment" or any employment of Crane by Kazanjian.

The evidence not supporting the hypothesis upon which this argument is based, it is unnecessary for us to discuss the cases supporting such argument.

Conclusion.

In the event this Court should not agree with Judge Carter's reasons for granting a dismissal of this action, then this Court should consider the contentions of appellant in this cross-appeal and affirm the decision of Judge Carter.

Respectfully submitted,

HENRY O. WACKERBARTH,

*Attorney for Cross-Appellant Raymond M. Crane,
doing business as Associated Fruit Distribu-
tors of California.*